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IN THE
COURT OF APPEALS OF INDIANA

KENDALL TARVIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0202-CR-131
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable R.F. Pierson-Treacy, Judge
Cause No. 49F19-0107-CM-143457

January 29, 2003

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Kendell Tarvin was convicted following a bench trial of carrying a handgun without a license, a Class A misdemeanor, and was sentenced to 365 days, 355 days suspended, with 355 days on probation.[1] He now appeals his conviction. We reverse.

Issue

Tarvin raises one issue for our review, namely whether the trial court properly admitted into evidence the handgun found during a pat down.[2]

Facts and Procedural History[3]

Indianapolis Police Officer Randall McKinney had patrolled the 1600 block of Rembrandt Street for his entire fourteen-year career. According to Officer McKinney, the area contained several daytime businesses that had recently been troubled by vandalism. Between 11:00 and 11:30 p.m. on June 30, 2001, Officer McKinney was conducting a routine patrol in the 1600 block of Rembrandt Street. While on patrol, he drove by a parked four-door Ford and noticed a female in the rear passenger seat, later identified as Ladinya Smith, reach down in the car as he passed by. Officer McKinney then turned around and pulled in behind the parked Ford.

When Officer McKinney started to get out of his marked police vehicle, he noticed

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[1] Tarvin was also charged with dangerous possession of a handgun, a Class A misdemeanor, which the trial court dismissed.

[2] Although Tarvin phrases his issue as denial of motion to suppress, we believe it is properly characterized as an admissibility of the evidence issue because it arises in the context of an appeal following a trial and judgment of conviction rather than an interlocutory appeal of the ruling on the motion to suppress itself.

Smith reach down again. Officer McKinney then walked up to the car and immediately asked the driver, Michael Pryor, for his driver's license.[4] Pryor handed Officer McKinney his license, but while he was handing it over, Smith again reached down. Officer McKinney instructed her to keep her hands where he could see them. After Officer McKinney instructed Smith to keep her hands where he could see them, Tarvin attempted to open the driver's side rear door and get out of the car. Officer McKinney pushed the door back in and instructed Tarvin to stay in the vehicle. Officer McKinney testified that Tarvin made other attempts to open the driver's side rear door. When Tarvin did not follow his instructions, he pulled out his duty revolver and ordered him to stay in the vehicle.

Officer McKinney then asked Tarvin to step out of the vehicle where he initiated a pat down search. In Tarvin's right back pocket Officer McKinney felt what he believed to be a firearm. Tarvin then told Officer McKinney that he had a firearm and did not have a license to carry it. Officer McKinney removed the handgun from Tarvin's back pocket.

On July 2, 2001, the State charged Tarvin with carrying a handgun without a license, a Class A misdemeanor, and dangerous possession of a handgun, also a Class A misdemeanor. At the bench trial, during Officer McKinney's testimony, Tarvin moved to suppress evidence seized during the stop, at which point the following exchange took place:

> [Court]: How does this relate to the Motion to Suppress? We've already gotten past all this. We are now where he's talking about he just found the firearm in his

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[3] We held oral argument in this case on November 22, 2002, at Indiana State University in Terre Haute, Indiana. We thank the university for its hospitality and extend our appreciation to counsel for their presentations.

[4] We note that the driver of the vehicle never committed a traffic violation. He was legally parked on the street.

back pocket, of the defendant?
[Defense]: Because, Your Honor, I believe that there was not reasonable suspicion to even stop the car. That the…
[Court]: That's already gone by. He's already been stopped. He's already been stopped. [Tarvin]'s already been asked to get out. There were no objections so this objection regarding not a reasonable stop is overdue and it's too late. Now, we are talking about when he felt a firearm in [Tarvin's] back pocket.
[Defense]: But Your Honor, I am…I am moving to suppress any evidence of the stop. He's…
[Court]: The evidence…I understand that. The evidence, preliminary that you are talking about, the stop has already gotten in without objection, so that's going to stay there. So if you are going to object to something about the pocket, what he found in the pocket, you can ask preliminary questions about that.
[Defense]: No, Your Honor.
[Court]: So, do you want to restate your motion?
[Defense]: No, I so move to suppress any evidence based on the fact that there was not reasonable suspicion to…for this stop. And that therefore, anything obtained due to the stop is the fruit of the poisonous tree and not…should not be admitted into evidence.
[Court]: State's response?
[State]: The State would argue that the officer testified that there had been criminal activity in the area. He saw the car where one of the persons on the car was making suspicious movements. Based on those movements, and the officer's opinion that there may have been. There was…based on the movements of one of the occupants of the vehicle and the area and the past history of what has been happening in the area, the officer had reasonable suspicion to investigate.
[Court]: The Motion to Suppress at this point is denied because at this point we have enough evidence and information to me, especially with the officer saying that he felt what could be a gun on defendant for officer safety, it is reasonable for him to go ahead and investigate that further. So the Motion to Suppress is overruled. Go ahead.

Transcript at 10-12 (emphasis added). At the conclusion of the bench trial, the trial court issued its ruling as follows:

[Court]: Okay, based on the evidence that's been presented and the way that it has been presented. Before there was any objection, the officer testified that he saw a person make furtive movements in the car and he decided to stop and investigate it. And while he was talking to the people in the car, there were other furtive movements made including…he didn't specifically say that word but putting a hand under the seat which is repeated case law that calls that furtive movements. And the danger of

> weapons in a car when the officer is alone, I have no problem at that point. And again there was no objection. The objection wasn't until later in time. So after this evidence has been has been presented then you can certainly look at the transcript, by the time there was an objection there was enough evidence for the officer to continue. And…with the search and have the people removed from the car and searched for weapons. And at that time is when the officer felt what he believed to be a weapon in the pocket of the defendant. And so I am finding the defendant guilty of [carrying a handgun without a license]. Of course, [dangerous possession of a handgun] was dismissed. Involuntary dismissal.

Transcript at 45-46. Tarvin now appeals the denial of his objection to the admission of the handgun into evidence and his conviction.

Discussion

At trial, Tarvin objected to the admission of the evidence seized as a result of the search of his person, specifically, the handgun found in his back pocket. Tarvin contends that Officer McKinney did not have a reasonable suspicion that criminal activity was afoot and therefore did not have adequate grounds to engage in an investigatory stop.

I. Standard of Review

Our standard of review in this area is well settled. The admission of evidence is within the sound discretion of the trial court, and the decision whether to admit evidence will not be reversed absent a showing of manifest abuse of the trial court's discretion resulting in the denial of a fair trial. Simmons v. State, 760 N.E.2d 1154, 1158 (Ind. Ct. App. 2002). In determining the admissibility of evidence, the reviewing court will only consider the evidence in favor of the trial court's ruling and unrefuted evidence in the defendant's favor.

Id.[5] When evaluating determinations of reasonable suspicion, we accept the factual findings of the trial court unless they are clearly erroneous. L.A.F. v. State, 698 N.E.2d 355, 356 (Ind. Ct. App. 1998). However, the ultimate determination of reasonable suspicion is reviewed de novo. Id.[6]

II. Validity of the Stop

Tarvin contends that Officer McKinney did not have adequate grounds to engage in an investigatory stop.[7] We agree. Generally, a search warrant is a prerequisite to a constitutionally proper search and seizure. Burkett v. State, 736 N.E.2d 304, 306 (Ind. Ct. App. 2000). In cases involving a warrantless search, the State bears the burden of proving an exception to the warrant requirement. Hanna v. State, 726 N.E.2d 384, 388 (Ind. Ct. App. 2000). The exception at issue here is the investigatory stop exception, where a police officer

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[5] The testimony of Tarvin's witnesses (Tarvin himself and Smith) conflicted with Officer McKinney's testimony. Specifically, Smith denied ever ducking down in the vehicle and Tarvin claimed that all occupants in the automobile had their hands in the air when Officer McKinney approached the vehicle. The trial court accepted Officer McKinney's testimony and we cannot reweigh the evidence or judge the credibility of the witnesses. Whitfield v. State, 699 N.E.2d 666, 668 (Ind. Ct. App. 1998), trans. denied.

[6] We note the dissent's position that we have not based our decision on the evidence favorable to the trial court's ruling. However, given that the new Appellate Rules make it clear that the facts should always be stated in accordance with the applicable standard of review, see Ind. Appellate Rule 46(A)(6)(b), we believe the dissent errs in considering exclusively the evidence favorable to the trial court's ruling. This is ultimately an admission of evidence issue, which is decided by an abuse of discretion standard, and we must consider the totality of the evidence in order to determine whether the trial court's ruling is "clearly against the logic and effect of the facts and circumstances before the court." Hyppolite v. State, 774 N.E.2d 584, 592 (Ind. Ct. App. 2002). The abuse of discretion standard of review does not limit a reviewing court to considering only the facts favorable to the trial court's decision; in fact, it would be impossible to apply the abuse of discretion standard by doing so. The trial court made no specific factual findings which are entitled to deference in this case, and therefore, we believe that we have rightly considered all of the facts adduced at trial in determining whether the evidence should have been admitted.

[7] Tarvin does not specifically mention in his brief whether he is arguing the state or federal constitution. However, given the cases he cites and the fact that he does not make a separate state argument, we assume he is only asserting a Fourth Amendment claim.

may stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion, supported by articulable facts, that criminal activity may be afoot, even if the officer lacks probable cause. Santana v. State, 679 N.E.2d 1355, 1359 (Ind. Ct. App. 1997) (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)). Reasonable suspicion must be based upon more than an officer's "inchoate and unparticularized suspicion or 'hunch.'" Webb v. State, 714 N.E.2d 787, 788 (Ind. Ct. App. 1999).

The "reasonable suspicion" requirement of the Fourth Amendment is satisfied if the facts known to the officer at the moment of the stop are such that a person "of reasonable caution" would believe that the "action taken was appropriate." Lyons v. State, 735 N.E.2d 1179, 1183-84 (Ind. Ct. App. 2000), trans. denied. The facts supporting a reasonable suspicion that criminal activity is afoot must rise to "some minimum level of objective justification" for the temporary detention of a person to be valid. Reeves v. State, 666 N.E.2d 933, 936 (Ind. Ct. App. 1996). In evaluating whether an officer had a reasonable suspicion to conduct an investigatory stop, a court must take into consideration the totality of the circumstances. Burkett, 736 N.E.2d at 306. When analyzing the totality of the circumstances we must look not only at the quantity of facts supposedly giving rise to a reasonable suspicion, but also the quality of those facts. Johnson v. State, 659 N.E.2d 116, 121 (Ind. 1995).

Tarvin contends his circumstances are analogous to those in Burkett. In Burkett, we noted that a defendant's presence in a high-crime area alone is not sufficient to establish a reasonable suspicion. 736 N.E.2d at 306-07 (citing Brown v. Texas, 443 U.S. 47, 52

(1979)).[8] The State in Burkett argued four facts that it claimed created a totality of the circumstances giving rise to a reasonable suspicion of criminal activity. The defendant was in a neighborhood known for drug trafficking at a late hour. He was wearing a hooded sweatshirt in seventy-six-degree weather.[9] He turned and walked away when the arresting officer pulled his patrol car up to the corner on which the defendant was standing, and his racial identity was the same as that of the group of men who someone complained were dealing in narcotics in the area where the defendant was located. Id. at 306.[10] This court held that given these facts, the totality of the circumstances did not give rise to a reasonable suspicion of criminal activity. Id. at 307.[11]

Although Tarvin analogizes his case to Burkett and contends that mere presence in a

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[8] In his brief, Tarvin states that Burkett held mere presence in a high-crime area does not constitute grounds for a search and seizure of the defendant. This is a misstatement. Burkett actually states, "At the outset, we note that neither presence in a high-crime neighborhood alone, nor an anonymous tip that is not confirmed in significant aspects, may constitute a reasonable suspicion." 736 N.E.2d at 306-07 (citations omitted) (emphasis added).

[9] One reason the Burkett court gave for not finding reasonable suspicion is that the defendant's attire added little to the totality of the circumstances analysis. "Though the sweatshirt may seem odd in light of the temperature, we decline to hold that people compromise their Fourth Amendment rights simply by wearing clothing that is baggy or that is somewhat warmer than would appear to be in season, especially not when the article of clothing is as mundane as a sweatshirt." 736 N.E.2d at 308.

[10] An additional reason the Burkett court gave for not finding reasonable suspicion was that the complaint the arresting officer received about individuals dealing in narcotics was not very specific, nor did it match the defendant precisely. 736 N.E.2d at 307.

[11] We noted in the Burkett case that the facts therein were similar to those in Tumblin v. State, 664 N.E.2d 783, 785 (Ind. Ct. App. 1996), where we concluded that an officer did not have reasonable suspicion to stop two black males who were walking in a high-crime area and turned to walk in the opposite direction when they came upon an approaching police car. 736 N.E.2d at 307. The Burkett decision noted that the facts present in its particular case "go incrementally beyond those in Tumblin in a couple of respects," but do not go beyond Tumblin enough to establish a reasonable suspicion. Id.

high-crime area[12] cannot constitute grounds for a search and seizure, this court has held that "presence in a high-crime area can be considered as a factor in the totality of the circumstances confronting an officer at the time of a stop." Crabtree v. State, 762 N.E.2d 241, 246 (Ind. Ct. App. 2002) (citing Green v. State, 719 N.E.2d 426, 429 (Ind. Ct. App. 1999)). In Crabtree, the defendant was seen next to a car with an open door. The car was at a location where there had been a complaint of a loud car stereo. The defendant appeared to be hiding behind the car when the officer saw him. He was crouched down and was straining to look over the car. In addition, it was around 4:30 a.m. This court held that the trial court did not err to the extent it determined the facts known to the officer would cause an ordinarily prudent person to believe that criminal activity had occurred or was about to occur. Id. at 247.

In addition to presence in a high-crime area, furtive reactions by defendants upon becoming aware of police presence may also be considered as a factor in the totality of the circumstances analysis. See Hailey v. State, 521 N.E.2d 1318, 1319-20 (Ind. 1988) (holding that investigatory stop was warranted where officer saw a man walking in the business district at 1:30 a.m. on a November night; upon the officer watching him, the man changed direction and changed his speed); Wilson v. State, 670 N.E.2d 27, 30-31 (Ind. Ct. App. 1996) (holding that investigatory stop warranted where defendant fled upon being observed by the police because flight, together with defendant's presence in a high-crime area, constituted

[12] Tarvin argues that there was no evidence presented at trial that his arrest occurred in a "high-crime area." However, Officer McKinney testified that the area contained several daytime businesses that had recently been troubled by vandalism.

circumstances supporting officer's claim that they had a reasonable suspicion that criminal activity was afoot). However, these cases have dealt primarily with situations where a person makes an abrupt, hasty attempt to avoid contact with law enforcement or where a person turns to walk away from an approaching officer. See Webb, 714 N.E.2d at 788-89 (suspect's presence in high-crime area, combined with actions of turning away and making hand movements toward his waistline, did not sustain officer's suspicion that criminal activity was afoot, as required to justify an investigatory stop).

We do not believe that the circumstances present in this case give rise to a reasonable suspicion that criminal activity was afoot. Here, Officer McKinney testified that sometime between 11:00 p.m. and 11:30 p.m. he drove by a Ford legally parked on the street in a daytime business area that had recently been plagued by graffiti. As he drove by, he noticed Smith reach down in the rear passenger seat, which drew his attention to the vehicle. The State contends that the totality of these circumstances gave rise to a reasonable suspicion of criminal activity. We disagree.

We believe the quality of the facts surrounding the time and place of Officer McKinney's investigatory stop is weak in comparison to similar cases. Specifically, we have difficulty defining an area recently victimized by graffiti as a "high-crime area." Although this fact is not insignificant, other cases involving "high-crime areas" have involved well-known drug trafficking areas. See Burkett, 735 N.E.2d at 306-07; Webb, 714 N.E.2d at 789. In addition, similar cases taking into account "lateness of hour" at the time of an investigatory stop have typically done so where the hour was much later than 11:00 on a

summer evening. See Webb, 714 N.E.2d at 789; Hailey, 521 N.E.2d at 1320. The "lateness of hour" factor is relevant for our analysis here because the stop occurred in the evening in a primarily daytime business area, but we do not believe it is as strong a factor in comparison to previous cases involving investigatory stops.

The final fact we must look at is Smith's "furtive movement." Officer McKinney testified that as he drove by the parked Ford, he noticed Smith "reach down" in the rear passenger seat. He stated that Smith's quick movement drew his attention to the Ford, and he turned around and pulled up behind it. Officer McKinney testified that Smith "reached down" again as he was exiting his police vehicle. We do not believe, under these circumstances, that reaching down in the back seat of a legally parked vehicle gives rise to a reasonable suspicion of criminal activity.[13] Furtive reactions by defendants upon becoming aware of police presence have been held to justify an investigatory stop. See Webb, 714 N.E.2d at 789. However, these typically involve an effort to evade contact with the police. Id. Clearly, no such evasive action was taken here by Smith.

The totality of the circumstances presented in this case, though similar, do not go beyond our previous cases that have held "turning away in an attempt to hide something" or walking away from a police officer at a late hour in a high-crime area is not sufficient to give rise to a reasonable suspicion that criminal activity is afoot. See Burkett, 736 N.E.2d at 307; Webb, 714 N.E.2d at 788-89. Because the circumstances in this case do not give rise to a

[13] We note that Officer McKinney stated he pulled behind the parked Ford because he noticed Smith make a furtive movement. However, there is no evidence that Officer McKinney searched or attempted to search Smith, the individual who initially drew his attention to the vehicle.

reasonable suspicion, the investigatory stop was invalid. Once Pryor gave Officer McKinney his driver's license and there was nothing in plain view to make him suspicious of any criminal activity, the stop was complete.[14]

Conclusion

We hold that Officer McKinney did not have reasonable suspicion, supported by specific and articulable facts, that criminal activity may be afoot. Because the investigatory stop and subsequent search of Tarvin's person was not supported by reasonable suspicion, any evidence found as a result of the improper search was "fruit of the poisonous tree" and should not have been admitted into evidence.

Reversed.

RILEY, J., concurs.

BAKER, J., dissents with opinion.

IN THE

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[14] After Pryor handed Officer McKinney his license, Tarvin attempted to exit the Ford and Officer McKinney pushed the passenger door closed and ordered him to stay in the vehicle. We believe Tarvin had the right to exit the vehicle because there was no reasonable suspicion that he or any other individual was engaged or

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BAKER, Judge, dissenting.

In Fourth Amendment suppression cases, we are duty-bound as a reviewing court to "consider the evidence favorable to the trial court's ruling and any uncontradicted evidence to the contrary to determine whether there is sufficient evidence to support the ruling." Murphy v. State, 747 N.E.2d 557, 559 (Ind. 2001) (emphasis added); accord Ogle v. State, 698 N.E.2d 1146, 1148 (Ind. 1998); Vance v. State, 620 N.E.2d 687, 691 (Ind. 1993). A grammatically and logically necessary inference from our supreme court's standard is that a reviewing court considers the evidence that is favorable to the ruling and disregards evidence unfavorable to the ruling when unfavorable evidence is contradicted. In other words, a reviewing court considers evidence contrary to the suppression ruling only when that evidence is uncontradicted. Indeed this court on many occasions has explicitly relied on that

about to engage in criminal activity. See Walls v. State, 714 N.E.2d 1266, 1268 (Ind. Ct. App. 1999), trans. denied.

same inference immediately after reciting the standard of review mentioned above. See, e.g., Williams v. State, 754 N.E.2d 584, 587 (Ind. Ct. App. 2001) ("If the evidence is conflicting, we consider only the evidence favorable to the ruling and will affirm if the ruling is supported by substantial probative evidence." (emphasis added)); Huffines v. State, 739 N.E.2d 1093, 1095 (Ind. Ct. App. 2001) (same); Hanna v. State, 726 N.E.2d 384, 388 (Ind. Ct. App. 2000) (same); Callahan v. State, 719 N.E.2d 430, 434 (Ind. Ct. App. 1999) (same).

I respectfully dissent because the majority's conclusion that Officer McKinney lacked reasonable suspicion disregards the conflicting evidence favorable to the trial court's ruling, applies an incorrect standard of review, and in so doing fails to state the facts in accord with the appropriate standard of review. See Ind. Appellate Rule 46(A)(6)(b) ("The facts shall be stated in accordance with the standard of review appropriate to the judgment or order being appealed."). Our supreme court has set forth the appropriate standard of review for the denial of a motion to suppress. The manner in which the majority employs "the totality of the circumstances" contraverts this standard as the majority considers evidence unfavorable to the ruling that directly conflicts with the evidence favorable to the ruling on the same factual issue. Slip op. at 6 n.6.

The factual issue is the behavior that drew Officer McKinney's attention to the car. In the majority's description of the encounter, the suspicious nature of Smith's conduct is minimized: "While on patrol, [Officer McKinney] drove by a parked four-door Ford and noticed a female in the rear passenger seat, later identified as Ladinya Smith, reach down in the car as he passed by." Slip op. at 2 (emphasis added). In actuality, Officer McKinney

testified: "So I see a Ford parked in the sixteen hundred block of Rembrandt, and as I go by, there was a female in the back ducked down real quickly, And [sic] that's what drew my attention to the car." Tr. p. 6-7 (emphasis added). The evidence is conflicting. Officer McKinney's testimony is favorable to the trial court's ruling because it shows Smith's evasive behavior and, as will be shown, justifies his reasonable suspicion that a crime had occurred or was about to occur.

It is cryptically acknowledged that the "testimony of Tarvin's witnesses (Tarvin himself and Smith) conflicted with Officer McKinney's," namely that Smith denied she ever ducked down during the encounter. Slip op. at 6 n.5. But the acknowledgement appears three pages later in a footnote to a paragraph reciting the standard of review. When later applying the law of what circumstances justify an officer's reasonable suspicion of criminal activity, the majority writes that Officer McKinney noticed Smith "reach down in the rear passenger seat, which drew his attention to the vehicle." Slip op. at 10. Again this description falls short of what actually drew Officer McKinney's attention to the parked car.

The majority concludes that "reaching down in the back seat of a legally parked vehicle" does not give rise to a reasonable suspicion of criminal activity. Slip op. at 11. While this legal principle is correct, it is not applicable to the instant case. The conflicting evidence favorable to the trial court's ruling shows that Smith "ducked down real quickly" when Officer McKinney first drove by and that she ducked down a second time when Officer McKinney returned. Tr. p. 6, 7. Reaching down in the back seat of a vehicle may not be evasive action but "ducking down" twice on the approach of a police vehicle is evasive. See

Webb v. State, 714 N.E.2d 787, 789 (Ind. Ct. App. 1999) (describing a furtive movement in two other cases as "an effort to evade contact with the police"). Smith's furtive movement took place as late as 11:00 p.m. in a daytime business district "recently victimized by graffiti." See slip op. at 10. "This 'combination of time, place, and actions'" of Smith gave Officer McKinney reasonable suspicion that criminal activity was taking place or about to take place. See id. (quoting Hailey v. State, 521 N.E.2d 1318, 1319-20 (Ind. 1988)); see also Crabtree v. State, 762 N.E.2d 241, 247 (Ind. Ct. App. 2002) (finding reasonable suspicion in part because defendant "appeared to be hiding behind" a car).

Because Officer McKinney formed a reasonable suspicion that criminal activity was taking place or about to take place, he had the authority to "temporarily freeze the situation in order to make an investigative inquiry." Johnson v. State, 766 N.E.2d 426, 429 (Ind. Ct. App. 2002), trans. denied. Therefore, Officer McKinney had a right to be where he was when Tarvin "grabbed the door and started to bolt out the door." Tr. p. 8. Given that Officer McKinney was the only officer on the scene confronting four individuals under these circumstances, it is my belief that he acted reasonably in blocking Tarvin's repeated attempts to flee and then in patting him down for weapons. See Platt v. State, 589 N.E.2d 222, 227 (Ind. 1992) (observing that fundamental focus of Fourth Amendment is reasonableness and holding that the officer acted reasonably in investigating defendant who fled upon seeing the officer's squad car). Tarvin has shown no violation of the Fourth and Fourteenth Amendments, and, thus, the trial court properly denied his motion to suppress the handgun found as a result of Officer McKinney's pat down. Therefore, I respectfully dissent and vote

to affirm the trial court's ruling.